

Message

From: Jackson, Laurianne [Jackson.Laurianne@epa.gov]
Sent: 1/5/2016 9:04:37 PM
To: Abendschan, Sharon [Abendschan.Sharon@epa.gov]
Subject: RE: Nelson Tunnel Site Definition

Ex. 5 Attorney Client (AC)

Laurianne M. Jackson
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Fax: 303/312-6953

From: Abendschan, Sharon
Sent: Tuesday, January 05, 2016 2:02 PM
To: Jackson, Laurianne <Jackson.Laurianne@epa.gov>
Subject: RE: Nelson Tunnel Site Definition

Ex. 5 Attorney Client (AC)

From: Jackson, Laurianne
Sent: Tuesday, January 05, 2016 1:54 PM
To: Abendschan, Sharon <Abendschan.Sharon@epa.gov>
Subject: RE: Nelson Tunnel Site Definition

Ex. 5 Attorney Client (AC)

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From: Abendschan, Sharon
Sent: Tuesday, January 05, 2016 1:45 PM
To: Jackson, Laurianne <Jackson.Laurianne@epa.gov>
Subject: RE: Nelson Tunnel Site Definition

Laurianne,

Ex. 5 AC/AWP By Consult with DOJ

Sharon

From: Jackson, Laurianne

Sent: Tuesday, January 05, 2016 1:35 PM

To: Madigan, Andrea <Madigan.Andrea@epa.gov>

Cc: Piggott, Amelia <Piggott.Amelia@epa.gov>; Abendschan, Sharon <Abendschan.Sharon@epa.gov>; Land, Kelcey <Land.Kelcey@epa.gov>

Subject: RE: Nelson Tunnel Site Definition

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From: Madigan, Andrea

Sent: Tuesday, January 05, 2016 12:17 PM

To: Jackson, Laurianne <Jackson.Laurianne@epa.gov>

Cc: Piggott, Amelia <Piggott.Amelia@epa.gov>; Abendschan, Sharon <Abendschan.Sharon@epa.gov>

Subject: RE: Nelson Tunnel Site Definition

Ex. 5 Attorney Client (AC)

Andrea Madigan

CERCLA Supervisory Attorney

Legal Enforcement Program

U.S. EPA Region 8

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(303) 312-6904

From: Jackson, Laurianne

Sent: Monday, January 04, 2016 2:25 PM

To: Madigan, Andrea <Madigan.Andrea@epa.gov>

Cc: Piggott, Amelia <Piggott.Amelia@epa.gov>; Abendschan, Sharon <Abendschan.Sharon@epa.gov>

Subject: FW: Nelson Tunnel Site Definition

Ex. 5 AC/AWP

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From: Ellington, Jerry L (ENRD) [<mailto:Jerry.L.Ellington@usdoj.gov>]

Sent: Tuesday, December 29, 2015 4:57 PM

To: Jackson, Laurianne <Jackson.Laurianne@epa.gov>

Cc: Hoffman, Heidi K (ENRD) <Heidi.Hoffman@usdoj.gov>; Freeman, James (ENRD) <James.Freeman2@usdoj.gov>

Subject: FW: Nelson Tunnel Site Definition

Ex. 5 AC/AWP

Ex. 5 AC/AWP

From: Joe Middleton [<mailto:middleton@twhlaw.com>]

Sent: Tuesday, December 22, 2015 3:14 PM

To: Jackson, Laurianne (Jackson.Laurianne@epa.gov) <Jackson.Laurianne@epa.gov>; Ellington, Jerry L (ENRD) <JEllington@ENRD.USDOJ.GOV>

Cc: Elizabeth Temkin <temkin@twhlaw.com>

Subject: Nelson Tunnel Site Definition

Confidential Settlement Communication Subject to FRE 408

Laurianne and Jerry:

We are getting back to you regarding our discussions of the definition of “Site” for the Creede consent decree. The last time we talked, we had agreed to put together some examples of other consent decrees which use language similar to the language we have advocated at Creede. That language defines the Site to include areas where hazardous substances from the Nelson Tunnel and Commodore Waste Rock Pile “have come to be located.” A list of several examples which use similar language is attached, along with our proposed definition of the Site.

I am also enclosing the final NPL listing for the Nelson Tunnel, which very clearly explains that the site does not just include the source of the release. *See* 73 F.R. 51369 (September 3, 2008) (“the site consists of all contaminated areas within the area used to identify the site, as well as any other location where that contamination has come to be located, or from where that contamination came.”). Similarly, the final FR notice amending the NPL in March of 1990 (also attached) recognizes that the boundaries of a site may change based on information developed during the RI/FS process in order to capture all the areas where hazardous substances have come to be located. *See* 55 F.R. 9690 (March 14, 1990).

I have also enclosed a case from the 9th Circuit recognizing EPA's broad authority to enlarge the boundaries of CERCLA sites in response to additional information, and discussing other relevant cases and EPA's own statements interpreting its authority.

Finally, I am enclosing figures of both the Nelson Tunnel and Gilt Edge sites. The figure of the Gilt Edge site helps illustrate just how similar that situation is to Nelson Tunnel. Both sites are headwater sites that impact downstream water quality beyond their "boundaries." The covenants at both sites need to cover the downstream impacts to be complete.

Please let us know when you have had a chance to review these materials, and we will schedule a call, if needed, to discuss the issue.

Thanks,
Joe Middleton

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